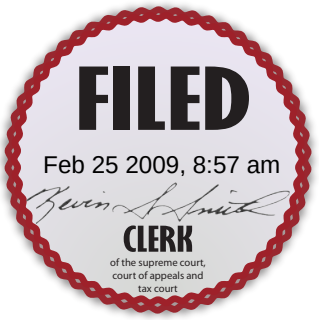

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IN THE
COURT OF APPEALS OF INDIANA

TERESA HITTSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0802-CR-74
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0406-FB-3

February 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Teresa Hittson appeals her conviction of and sentence for Class D felony criminal recklessness.[1] She argues the evidence was insufficient to support her conviction and the court failed to articulate and balance aggravators and mitigators in assigning her sentence.[2] We affirm in part, and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

About 10:57 p.m. on March 1, 2004, the police were dispatched to the residence of Teresa and Mark Hittson to conduct a welfare check based on an anonymous call reporting a possible drug overdose by Teresa. Sergeant Bret McCord arrived at the Hittsons' residence and parked his marked police car behind two other vehicles in the driveway. Sergeant McCord did not have his police lights or siren activated, but he left his driving lights on to illuminate the area as he proceeded toward the home. As he went, he checked inside the parked vehicles for persons who might need assistance. When he reached the front panel of the vehicle closest to the house, he heard a gunshot inside the house. McCord immediately notified dispatch of the gunshot and remained under cover until assistance arrived.

Approximately seven minutes later, Officer John Holding arrived in his marked police car. His lights and siren were not activated. Officers Holding and McCord

[1] Ind. Code §§ 35-42-2-2(b)(1) (defining criminal recklessness) & 35-42-2-2(c) (enhancing crime to Class D felony for use of a deadly weapon).

[2] In her final paragraph of argument, Hittson states her sentence "was improper and inappropriate in light of the nature of the offense and character of the Defendant. The sentence should be reviewed and revised." (Appellant's Br. at 19.) However, she provides no analysis of her offense or her character in support of the argument that the sentence is improper. Accordingly, she has waived our review of the appropriateness of her sentence under Ind. Appellate Rule 7(B). *See* Ind. Appellate Rule 46(A)(8) (requiring argument supported by cogent reasoning).

approached the residence together to further assess the situation. They began by shining their flashlights through the front windows of the home, looking for some indication of what was happening or whether anyone was injured. They checked the front door and found it locked, and they saw nothing out of the ordinary on the front of the house. Officer Holding proceeded alone down the east side of the house to the back of the home. When he looked through a kitchen window, he noticed shredded debris on the counter and floor. He then came to a sliding glass door. He stood just east of the sliding glass door, held a flashlight with his right hand, and peered around the doorframe to look into the house. When he saw nothing out of the ordinary, he turned off his light and started to turn east to go back around to the front of the house. "Not more than two seconds" had passed after he turned off his flashlight, (Tr. at 504), when he saw a "muzzle flash" out of the corner of his eye and "heard a loud bang that [he] perceived to be a gunshot." (*Id.*) He ran to the front of the house and reported to Sergeant McCord that someone had shot at him from inside the house.

About the same time, Officer Herb Holding arrived at the scene. The three officers stationed themselves in safe places around the house to keep lookout until more officers arrived. As they waited, they saw a muzzle flash and heard a gunshot inside the house. They could also hear a loud shrill voice yelling inside the house. Soon thereafter, SWAT arrived. The hostage negotiator called the house and was able to convince the Hittsons to leave the house.

Once the Hittsons were in custody, Officer John Holding went into house to look in the area near sliding glass door and "looked down at the wall, just to see if there was

something there where I was standing, and I noticed a small hole there." (Tr. at 515.) State's Exhibit 24 is a diagram of the Hittsons' house, and it shows a bullet hole in a wall east of the sliding glass door, just feet from where Officer Holding had been standing when the shot was fired. A bullet was recovered from between that wall and an abutting dishwasher. Police found a gun with five bullet casings in the cylinder. Two bullets had been fired, and "[t]he hammer was back on a live round," (*id*. at 649), so that another bullet could be fired rapidly.

The State charged Hittson with Class B felony attempted aggravated battery, Class C felony attempted battery by means of a deadly weapon, and three counts of Class D felony criminal recklessness. A jury found Hittson guilty of one count of criminal recklessness and not guilty of the remaining charges. The court sentenced Hittson to three years imprisonment, but suspended all of the time. It ordered her to spend eighteen months on home detention and eighteen months on supervised probation.

DISCUSSION AND DECISION

1. Sufficiency

Hittson challenges the sufficiency of evidence to support her conviction of criminal recklessness. Our standard of review for sufficiency of evidence questions is:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It

> is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, citations, and footnote omitted) (emphasis in original). A conviction may be supported by circumstantial evidence alone. *Green v. State*, 808 N.E.2d 137, 138 (Ind. Ct. App. 2004).

A person commits Class B misdemeanor criminal recklessness if he or she "recklessly, knowingly, or intentionally performs . . . an act that creates a substantial risk of bodily injury to another person." Ind. Code § 35-42-2-2(b). The offense becomes a Class D felony if "it is committed while armed with a deadly weapon." Ind. Code § 35-42-2-2(c). A risk is substantial if it has "substance or actual existence." *Woods v. State*, 768 N.E.2d 1024, 1027 (Ind. Ct. App. 2002) (quoting *Boushehry v. State*, 648 N.E.2d 1174, 1177 (Ind. Ct. App. 1995), *reh'g denied*).

Hittson claims she did not commit criminal recklessness because the State did not prove she shot "at" any of the officers. We addressed a similar argument in *Green*. Green was upstairs in his house while his wife and his brother-in-law, James, were on the first floor. James heard the sound of a gunshot from the second floor, and a bullet struck the wall directly behind where he and his sister were standing. We held:

> While it is true that there was no direct evidence that Green shot the weapon at James, there is circumstantial evidence that Green shot the gun and the bullet struck a wall directly behind James. Such circumstantial evidence will be deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt.

808 N.E.2d at 138. Accordingly, the State was not required to prove Hittson shot "at" the

officers, only that she created "substantial risk of bodily injury." *See* Ind. Code § 35-42-2-2(b) (defining criminal recklessness).

Hittson next asserts she did not put anyone at "substantial risk." However, we cannot agree. In *Woods*, 768 N.E.2d at 1028, we explained that an intoxicated defendant creates a substantial risk of bodily injury when he fires shots in a residential area in which he knows there are other people. In *Smith v. State*, 688 N.E.2d 1289, 1291 (Ind. Ct. App. 1997), we held Smith created substantial risk by shooting a gun six times in his backyard, which was within 50 yards of ten homes and a "stone's throw" from a park where a festival was occurring. In *Upp v. State*, 473 N.E.2d 1030, 1032 (Ind. Ct. App. 1985), we held Upp created substantial risk when he shot near someone because the bullet could have ricocheted.

Hittson knew police officers were coming to her house. After police arrived, they walked around Hittson's house, shining flashlights through the windows to look for injured persons, and for nearly thirty minutes they were near the house trying to determine the nature of the situation. During that time, Hittson fired three shots. Some or all could have gone through a wall, window, or door and hit an officer. Hittson created a substantial risk of bodily injury and the evidence is sufficient to sustain her conviction.

2. Sentencing

Hittson asserts the sentencing statement did not support her three-year sentence, which is the maximum for a Class D felony.[3]

[3] "A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years." Ind. Code § 35-50-2-7.

"[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* A trial court abuses its discretion if it fails to enter a sentencing statement or if it finds aggravators unsupported by the record. *Id.* When a trial court has found improper aggravators, we must remand for resentencing if we cannot confidently say the "court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id.* at 491.

Hittson claims the court found two aggravators and both are improper. Hittson asserts the two aggravators were: (1) "Had the officer been in front of that door when the shot was fired, we'd be trying a murder case (T. 1018)." (Appellant's Br. at 18); and (2) "the risk of injury to the police officer (T. 1018-1019)." (*Id.*)

The sentencing order does not include any statement of aggravators or mitigators, and the State challenges Hittson's characterization of the aggravators. At the sentencing hearing, the trial court said:

> There's not been any repeat of this, but the problem with this type of thing, although it's a recklessness charge, is the permanence of it. Had the officer been in front of that door when the shot was fired, we'd be trying a murder case. You know? Firing a gun, I have more guns than they have. I've never shot at anybody. And her own statement, "Let his parents come in and then we'll kill them." That's absolutely absurd. I am worried. I have the mitigating circumstances, but I have the seriousness of this crime which even though it's called recklessness, and probably was, I don't argue with the jury at any time, but that recklessness could have cost a man his life.

> Almost did. You know, the distance between, his testimony was he turned away from the door and almost instantly the shot rang out and the hole went through the door. You know, that could have been a dead man. I feel for the officers because that's their job. Of course, they do it voluntarily, so it's okay, but we need them. We expect them to serve us and we expect them to protect us. We don't expect people who own guns to be shooting through the door. That's not the rational decision of a person, not in my mind. And that is the aggravating circumstance that I think controls this case. The Supreme Court wants me to say why and this is exactly why. Normally, had we not had the shooting, this would have been nothing. There probably wouldn't have been a charged [sic] filed. They'd gone [sic] out there and fought about it and argued about it and everything would have been fine, but when you start firing a gun you can't recall a bullet. If that officer had not been away from that door, you know, we would have had him buried a long time ago. And that would have been horrendous to us, to his family, to all of us who know him because that's part of what these people do. But we have a duty, I think I have an obligation to try to ensure that that's not going to happen again. And I know of no other way to do it and [sic] to sentence this lady.

(Tr. at 1018-1020.)

Although the trial court stated "that is the aggravating circumstance that I think controls this case," (*id.* at 1019), we are unsure what the "that" is. Neither are we sure how many aggravators the trial court found. The trial court might have found aggravators in the "permanence" of the shooting, the "seriousness" of the crime, and the irrationality of the decision to shoot, or it might have made all those statements to explain why it thought the specific circumstances of this crime justified an enhanced sentence.

Without knowing how many aggravators the court found or what those aggravators were, we are unable to appropriately review Hittson's three-year maximum sentence for a Class D felony because we cannot determine whether the aggravator or aggravators are supported by the record. *See Anglemyer*, 868 N.E.2d at 490 (trial court abuses discretion if aggravators are not supported by the record). The trial court's

discussion seems premised on the fact Hittson shot a bullet through the door where the officer had been standing seconds earlier. If that was an aggravator, it would be an abuse of discretion because there was no evidence a bullet went through a door. Accordingly we reverse Hittson's sentence and remand so the court may enter a more specific sentencing order that clearly defines the aggravators and mitigators.[4]

CONCLUSION

We affirm Hittson's conviction of Class D felony criminal recklessness, but we reverse her sentence and remand for the court to enter a more specific sentencing order that justifies her three-year sentence for a Class D felony.

Affirmed in part, reversed and remanded in part.

NAJAM, J., and ROBB, J., concur.

[4] From the trial court's sentencing statement it is also unclear whether the court found one or two mitigators. The court mentioned Hittson's lack of criminal history and the fact that she had not committed additional crimes in the nearly four years between the shootings and the sentencing, but we do not know whether mention of additional shootings was just a further comment on her criminal history.